KANDASAMI KALIAPPA GOUNDER

v.

MOHD. MUSTAFA SEENI MOHD.

PRIVY COUNCIL
LORD DIPLOCK
LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
JOHN MEGAW
[APPEAL NO. 31 of 1980]
16 MAY 1983

CONTRACT: *Written document - Whether or not it created legal effect - Whether it created a tenancy of licence - Construction of document - Intention of parties.*

LANDLORD AND TENANT: *Agreement - Whether a lease of licence - Whether a tenancy was created.*

The appellant Kandasami s/o Kaliappa Gounder claimed that he took occupation of the ground floor of a restaurant premises at No. 43 Penang Street, Penang as a tenant for the purpose of carrying on the business of an eating shop on his own account. He therefore claimed to be within the protection afforded by the Control of Rent Act 1966. But the respondent Mohd. Mustafa said that the appellant came there in the capacity of cook to assist him in the conduct of his own eating shop business.

On 30 July 1970 both parties signed a document (July Document) described as a lease of the ground floor of the said premises. The appellant's version of the document was that, it was not intended to have any legal effect or if it had legal effect, that it created a tenancy. The respondent said that it was intended to have a legal effect but that upon its true construction it created only a licence, which had been determined.

The High Court decided there was a tenancy while the Federal Court decided that there was a licence. Therefore this appeal by the appellant.

Held:

[1] If parties put their names to a document and one party represents and the other party agrees that the document shall not, as between themselves have any legal effect so that it exists only to answer some other purpose, the law will give effect to that collateral agreement and deny the document whatever legal effect it might otherwise have had.

[2] The true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of the landlord and a tenant and not that of a licensor and licensee, as most of the clauses in the document were covenants such as quiet enjoyment and re-entry which are normally found in standard tenancy agreements.

[3] The July Document must be disregarded, so that the appellant remains in occupation of the ground floor of No. 43 Penang Street by virtue of the monthly tenancy agreement found by the trial Judge and not challenged in the Federal Court.

[Appeal allowed. Order of the trial Judge restored. Respondent to pay costs.]

Cases referred to:
Watt v. Thomas [1947] AC 484
Neill v. Duke of Devonshire [1882] 8 AC 135

Other sources referred to:
Norton on Deeds, 2nd Edn., p. 127

For the appellant - R.R. Chelliah (R.K. Sharma with him)
For the respondent - Gerald Godfrey QC (Nicholas Stewart with him)

JUDGMENT

Lord Brightman:

This is an appeal from a judgment of the Federal Court of Malaysia, reversing the decision of the High Court given at Penang. The plaintiff in the action is in occupation of restaurant premises at No. 43 Penang Street, Penang. He claims to be in possession as tenant, and therefore to be within the protection afforded by the Control of Rent Act 1966. The defendant claims that the plaintiff is only a licensee, whose licence has been determined. The High Court Judge decided that there was a tenancy while the Federal Court decided that there was a licence. The plaintiff now appeals.

The dispute between the plaintiff and the defendant can conveniently be considered by reference to two distinct phases. It is common ground that the plaintiff came to No. 43 in April 1970. The plaintiff says that he came there as tenant of the ground floor for the purpose of carrying on the business of an eating shop on his own account. The defendant says that the plaintiff came there in the capacity of cook to assist the defendant in the conduct of his own eating shop business. The first question therefore is to decide in what capacity the plaintiff came to the premises in April 1970, as tenant or as cook. It is also common ground that on 30 July 1970 the plaintiff and the defendant put their signatures to a document which is described as a lease of the ground floor of No. 43. The plaintiff says that this document was not intended to have any legal effect as between himself and the defendant; or, if it had legal effect, that it created a tenancy. The defendant says that the document was intended to have a legal effect, but that upon its true construction it created only a licence. The issue which arises on the first phase of the case is quite separate and distinct from the two issues which arise on the second phase. It is necessary to reach a decision on the first phase before approaching the second phase, because the facts so decided will be part of the surrounding circumstances in the context of which the two issues arising on the second phase will fall to be determined.

Their Lordships turn to a consideration of the first phase. The plaintiff's evidence is that in 1970 he was the tenant of premises in China Street, Penang, where he carried on the business of an eating shop. His lease was about to expire. He looked around for alternative premises, and discovered that the ground floor of No. 43 Penang Street was vacant. He made enquiries, and was told that No. 43 was held by the defendant under a lease. Negotiations ensued, as a result of which the plaintiff took the ground floor upon an oral tenancy agreement at a rent of RM230 a month. Under this agreement he was to pay RM460, representing 2 month's rent, as a deposit and he was told that he could remain as long as he kept up the payments. The rent was to be inclusive of the cost of light, water, use of furniture and fittings, use of the defendant's eating shop licence and use of his business name "Nava India Restaurant". The plaintiff paid the first RM230 on the same day as the agreement was made, and the balance on 15 March. He was let into possession of the

premises in April 1970, and he started up business in the same month. His evidence was corroborated by two witnesses who had supplied foodstuffs to him in that month, and by another witness who had eaten there on an Indian festival day.

The defendant denied that the plaintiff took over the business in April 1970. His evidence was that the plaintiff came to the premises as his employee, in the capacity of a cook to assist the defendant in the conduct of his own restaurant business.

The learned trial Judge made this assessment of the defendant's evidence:

> After watching and listening to the defendant for nearly 3 days during his examination in chief, cross-examination and re-examination, I had no doubts and found him to be a most untruthful witness.

The trial Judge concluded as follows:

> On the evidence adduced by both parties I found, on the balance of probabilities, that in the month of March 1970 there was an oral agreement between the plaintiff and the defendant whereby the former was allowed to enter and occupy the said premises for an indefinite period after paying the defendant a deposit of RM460 being 2 month's rental of RM230 per month which was agreed to include light, water, use of furniture and fittings and the use of the defendant's eating shop licence and business name.

Although in that passage the trial Judge does not in terms speak of the creation of an oral tenancy agreement, it is implicit in his reference to "2 months' rental" that that was the nature of the agreement which he found to have existed. Any possible doubt as to the Judge's finding is laid at rest when, in a later passage he stated that "the plaintiff was originally granted a monthly tenancy of the said premises for an indefinite period."

According to the findings of the trial Judge, therefore, based on his view of the credibility of the witnesses, the plaintiff pursuant to an oral agreement made in March 1970 went into occupation of the ground floor of No. 43 Penang Road in April, and thereafter carried on the business of an eating shop on his own account.

Against that background their Lordships turn to the second phase of the case. On 30 July 1970, that is to say, between 4 and 5 months after the oral tenancy agreement had been made, there came into existence a document which the defendant claims to be a licence, and which the plaintiff asserts had no legal effect or alternatively was a lease. This document, which their Lordships will call " the July Document", opens with the words "This Lease". It is expressed to be made between the defendant "hereinafter called the Lessor" of the one part and the plaintiff "hereinafter called the Lessee" of the other part. The first recital states that the defendant (i) is the owner of the business carried on at No. 43 under the name "Nava India Restaurant and Cafe", (ii) holds an Eating House Licence, and (iii) is the tenant of No. 43. The second recital is in the following terms

> And Whereas the Lessor wishes to lease to the Lessee the said business of an eating shop together with the use of the ground floor only of the said premises in which the same is now carried on for a term of one year from 1 August 1970 on the terms and conditions hereinafter appearing.

Clause 1 then contains the grant of a term of one year in language which is wholly appropriate to a demise and wholly inappropriate to the grant of a licence. It reads as follows:

> 1. In consideration of the rents and covenants hereinafter reserved and contained and on the Lessee's part to be performed and observed the Lessor hereby lets to the Lessee the ground floor only of the said premises together with the full right and liberty to the

> Lessee to carry on the business of an eating house on the said premises, under the aforesaid licence issued to the Lessor and the right of use of all the furniture (a list of which is annexed hereto) and fittings therein TO HOLD same unto the Lessee for a term of one (1) year from 1 August 1970 terminable on the 31 July 1971. Paying therefore the monthly rental of Dollars Three Hundred (RM300) only by monthly payments on the 1st day of each and every month, the first of such payments to be made on 1 September 1970.

Clause 2 contains a series of covenants by "the Lessee for himself and his successors in title". These include a covenant to pay "rent", to keep "the demised premises" in "good and tenantable repair", and not to "assign, under-let or otherwise part with possession" of the premises without the consent of the lessor. Clause 3 contains a covenant for quiet enjoyment in the form appropriate to a lease. Clause 4 contains a power of re-entry in a form appropriate to a lease. Clause 5, however, is totally inconsistent with the grant of a lease and is consistent only with a licence. It is in the following terms:

> 5. It is expressly agreed and understood that the [agreed to be a misprint for "no"] right of tenancy whatsoever of the said premises or any portion thereof is intended to be passed to the Lessee by the Lessor and that the relationship of Landlord and Tenant does not exist between the Lessor and Lessee as regards the said premises or any part thereof.

Clause 7 reads:

> The Term 'Lessor' and 'Lessee" shall mean and include their respective assigns, Executors and Administrators.

In the result the two recitals are consistent either with a lease or a licence; Clause 1 is appropriate only to a lease. At least three of the lessee's covenants are appropriate only to a lease. One of the Landlord's covenants is appropriate only to a lease. The remaining clauses or sub-clauses, with the sole exception of Clause 5, are in their substance appropriate either to a lease or to a licence.

Their Lordships will deal first with the findings of the trial Judge as to the manner in which the July Document came into existence. In considering the evidence, two facts must be allowed for. First, the answers are translated from Tamil. Secondly the trial Judge did not have the benefit of a shorthand writer, so that the evidence is not recorded in the form of question and answer.

The evidence of the plaintiff was that

> The defendant wanted the agreement drawn up because he wanted protection under the Rent Control law as he was collecting excessive rent. He was collecting about RM600 - RM700 for rooms upstairs. Defendant told me so and also that he would get into trouble with income tax if one reported to the revenue authorities. Agreement was entered into for benefit of defendant who told me that I need not worry about it ... It was not intended that the written agreement should be binding on me.

The plaintiff added later "I cannot read or write Tamil. I can only write my name. I did not read the agreement." The language of the July Document is English, and it is not suggested that the plaintiff could read that language.

The learned Judge found as follows:

> On or about 30 July 1970 the defendant managed to induce the plaintiff, an illiterate person, to sign a written agreement ... the said agreement does not contain all the terms which the parties had negotiated previously and agreed upon and was not intended to be binding upon them.

On that finding it was not strictly necessary for the trial Judge to construe the July Document, as he appreciated. However, it is clear from the following passage that he did not regard the July Document as capable of advancing the defendant's case:

> Even if the various clauses of the document were to be considered, it would be seen that the majority therein are covenants such as those for quiet enjoyment and re-entry, which are normally found in standard tenancy agreements. In my opinion, therefore, the true relationship between the parties as revealed by their conduct and the surrounding circumstances was that of the landlord and a tenant and not that of a licensor and licensee.

In the result the Judge declared that the plaintiff was tenant of the ground floor of the premises No. 43 Penang Street.

The defendant appealed. The defendant's Counsel did not seek to challenge the finding of the trial Judge in relation to the first phase of the case. This is apparent from the following observations of the Federal Court:

> The agreement was dated 1 July 1970 but the respondent alleged and the learned Judge found as a fact that the respondent was actually let into occupation on an oral agreement of lease three months earlier ... Insofar as the alleged oral tenancy commencing on 1 April can be said to be a fact found by the learned Judge on the oral testimony of the (plaintiff), Mr. Hepworth (Counsel for the defendant) did not seek to persuade us to upset it and to come to our own finding that it was wrong or could not be supported by the evidence considered as a whole. But he argued that if the parties subsequently and voluntarily agreed to enter into another agreement, then it is this subsequent agreement that must be looked at to determine their relationship.

The Federal Court then considered, and rejected, the finding of the trial Judge that the July Document was not intended to have any legal effect as between the parties named in it. The Court rejected the trial Judge's finding because of the "unsubstantial and unfounded" nature of the reasons said by the plaintiff to have been put forward by the defendant for wishing to bring the document into existence. The defendant could not have wanted the document in order to afford himself protection under the rent control legislation, because that legislation protected only the tenant and not the landlord. Nor could the defendant have wanted it in order to avoid trouble over income tax with the revenue authorities; if he wished to avoid disclosure to the revenue authorities, the last thing he would have done would have been to commit his rental income to paper.

Their Lordships agree that no sufficiently educated person would have been disposed to accept the reasons attributed to the defendant as a motive for bringing the July Document into existence. But the plaintiff was not an educated person. There is no reason to suppose that an uneducated person might not have been prevailed upon to accept at face value reasons advanced by the defendant which would not have deluded someone with a knowledge of the Rent Acts and experience of the administration of the system of taxation. There is the further problem, that the Federal Court's finding involved their acceptance of the defendant's evidence and their rejection of the plaintiff's evidence. The issue was one which depended entirely on an assessment by the Judge of the credibility of the witnesses. The trial Judge had found the defendant to be a most untruthful witness, while he accepted the plaintiff as a witness of truth. Their Lordships readily defer to the Federal Court's superior knowledge of local conditions and attitudes, and recognise their experience in evaluating the evidence of witnesses drawn from different cultures. But they feel it important to emphasise the pre-eminent weight which must be attributed to a trial Judge's finding of fact based upon the credibility of witnesses whom he has seen and heard under

examination and cross-examination, particularly in relation to a question of fact the answer to which is wholly dependent on the testimony of such witnesses. Their Lordships respectfully draw attention to *Watt v. Thomas* [1947] AC 484 and in particular to the speech of Lord Thankerton at pp. 487 and 488. In their Lordships' opinion the Federal Court was not justified in rejecting the finding of the trial Judge that the July Document was not intended by the plaintiff and the defendant to be binding upon them.

If parties put their names to a document, and one party represents and the other party agrees that the document shall not, as between themselves, have any legal effect so that it exists only to answer some other purpose, the law will give effect to that collateral agreement and deny the document whatever legal effect it might otherwise have had. The result in the present case is that the July Document must be disregarded, so that the plaintiff remains in occupation of the ground floor of No. 43 Penang Street by virtue of the monthly tenancy agreement found by the trial Judge to have been made in March 1970 and not challenged in the Federal Court.

That conclusion is sufficient to dispose of this appeal, but there is a broader and equally cogent ground. The Federal Court considered that "the dominant intention of the parties" was

> to give a licence to run the (defendant's) business of an eating shop as the (plaintiff's) own for the term with necessarily the use of the ground floor for this purpose. Clause 5 becomes decisive of the special relationship between the parties and the habendum must be seen to be an error of drafting.

In their Lordships' view it is the habendum and not clause 5 which is decisive. Except for Clause 5, every recital and every clause of the July Document is either inconsistent with the grant of the licence or is neutral. Clause 5 is out of step with the rest of the document. It seeks to attach a label of "licence" to a document which plainly is not licence. It fails in that objective. The label does not attach. Furthermore, there is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution. *Neill v. Duke of Devonshire* [1882] 8 App Cas 135, 149, *Norton on Deeds* 2nd Edn., p. 127.

Although later events can only play a limited role in the assessment of earlier events, their Lordships do not wish to part with this appeal without observing that the conclusion reached by the trial Judge was amply borne out by events which were subsequent to the July Document. In March 1971, when a dispute arose as to arrears of rent, the defendant applied to the magistrate's Court for a warrant of distress for rent, a procedure which would not have been available to licensor. On 26 May 1972 the defendant's former solicitors wrote to the plaintiff in the following terms:

> We are instructed that you are the monthly tenant of our client in respect of the abovesaid premises. We are instructed by our client to give you notice, which we hereby do, to quit and deliver up possession of the said premises to our client within one month from the date of receipt hereof one month from the end of the current month of your tenancy.

On 18 July 1972, which was 10 months after the issue of the writ in this action, the defendant issued a summons in the Session Court to recover possession of the premises. The first sentence of his statement of claim reads "The defendant is the plaintiff's monthly tenant in respect of the ground floor of premises No. 43 Penang Street ... The said premises are subject to the Control of Rent Act 1966." In the light of these later events, it is difficult to suppose that the defendant then thought that he had granted to the plaintiff a mere licence to occupy the ground floor of No. 43.

For the reasons indicated, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed, and that the order of 30 June 1978 of the Honourable Mr. Justice Gunn Chit Tuan should be restored. The part of the order of the Federal Court of 2 February 1979 which gave a general liberty to apply to the High Court can, in the opinion of their Lordships, usefully remain on foot. The respondent will pay the costs of the appellant in the Federal Court and before this Board.

Also found at [1983] 2 CLJ 55